DATO MENTERI OTHMAN BIN BAGINDA & ANOR. v. DATO OMBI SYED ALWI BIN SYED IDRUS

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) Ag. L.P., Salleh Abas F.J., Ibrahim Manan F.J. & Hashim Yeop A. Sani J.) July 15 & September 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 104 of 1980]

Constitutional Law — Election of Undang of Jelebu — Whether election contrary to adat laws and constitution of luak of Jelebu — Application for declaration that purported election invalid — Whether court has jurisdiction to entertain action — Whether Undang immune from being sued in personal capacity — Dewan Keadilan dan Undang given power to advise on questions relating to Malay custom — Jurisdiction declined on ground that Court is forum non conveniens — Constitution of Negri Sembilan, Articles XIV and XVI — Federal Constitution, arts. 71 and 181.

Customary Law — Election of Undang of Jelebu — Whether in accordance with adat laws and constitution of luak of Jelebu — Dewan Keadilan dan Undang proper body to decide — Constitution of Negri Sembilan, arts. XIV and XVI.

Administrative Law — Declaration — Application for declaration that election of Undang of Jelebu void — Dewan Keadilan dan Undang given power to resolve dispute — Court forum non conveniens — Jurisdiction declined.

In this case the respondent had applied for a declaration that the purported appointment by the first appellant of the second appellant as the new Undang of Jelebu was contrary to the adat, custom and constitution of the luak of Jelebu. The appellants after filing their defence applied for an order that the statement of claim be struck out on the ground that the court had no jurisdiction because the dispute involved a question of adat and custom of the Malays in the luak and on the further ground in the case of the second defendant that under the Constitution of Negri Sembilan he as Ruling Chief enjoyed legal immunity in his personal capacity. The learned trial Judge dismissed the application of the appellants, holding that the court had jurisdiction to entertain the action and that the second defendant did not enjoy legal immunity. The appellant appealed.

Held, by a majority (Suffian L.P. dissenting): (1) the Dewan Keadilan dan Undang is given power under the Constitution to advise on matters relating to Malay custom and as the Dewan in this case had blessed the appointment of the second defendant as the Undang of Jelebu, the court should not attempt to usurp the function of the Dewan, which is a more suitable forum for discharging that function;

(2) the court should decline jurisdiction on the ground that it is *forum non conveniens* and that there is another body which is more appropriate and which has been given power under the Constitution of the State to decide the matter;

(3) the respondent in this case had sent petitions to His Highness the Yang di-Pertuan Besar and to other ruling chiefs and also to the Secretary of the Dewan and the Dewan having sat and deliberated upon the petitions and finally given its ruling the matter should have ended there. The respondent is therefore estopped from raising the matter again, especially before the court of law;

(4) article 181(2) of the Federal Constitution is irrelevant in this case as the very appointment of the second appellant is under attack. The Article does not define a Ruler but deals rather with the consequence of one being a Ruler.

Cases referred to:-

(1) *Ibeneweka* v. *Egbuna* [1964] 1 W.L.R. 219, 225.

(2) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 571.

(3) *N.T.S. Arumugum Pillai* v. *Government of Malaysia* [1980] 2 M.L.J. 283.

(4) *Rediffusion (Hongkong) Ltd.* v. *Attorney-General* [1970] A.C. 1136, 1155-6.

(5) *Minister of Home Affairs* v. *Fisher* [1979] 3 All E.R. 21.

(6) *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds* [1979] 3 All E.R. 129, 136.

(7) *Government of Malaysia* v. *Government of the State of Kelantan* [1968] 1 M.L.J. 129.

HIGH COURT.

Abdul Razak bin Ahmad for the plaintiff.

Ariffin bin Jaka for the defendants.

Cur. Adv. Vult.

Abdul Hamid F.J.: There are three applications before the court, first by the plaintiff for an interim injunction to restrain the second defendant from acting and/or exercising the duties and powers of Undang Luak Jelebu; second, by each of the defendants for an order that the Writ of Summons and the plaintiff's statement of claim be struck out on the ground that the court has no jurisdiction in the matter and pursuant to Order 25 rule 4 of the Rules of the Supreme Court, 1957.

In Seremban High Court Civil Suit No. 40 of 1980 the plaintiff asks for a declaration that the appointment of the second defendant as the new Undang of Luak Jelebu on February 4, 1980 made by the first defendant is invalid, ineffective, void and of no effect on the ground that it is *ultra vires* the adat laws and constitution of Luak Jelebu.

It is the plaintiff's allegation that on the death of the 14th Undang of Luak Jelebu on November 20, 1979 he as Dato' Ombi a Dato' Lembaga of Luak Jelebu, was responsible under the adat laws and constitution of Luak Jelebu (hereinafter called 'the adat') to submit a list of eligible candidates for selection as Undang of Luak Jelebu. He presented the names of three candidates to the first defendant as Dato' Menteri in accordance with the adat. On February 4, 1980 the first defendant appointed the second defendant as the new Undang although the second defendant was not a candidate for selection as Undang and was not an eligible person according to the adat. He also alleged that the purported appointment of the second defendant was disapproved and rejected by the plaintiff and six Dato' Lembagas of Luak Jelebu.

The first defendant contended that on the death of the 14th Undang he became the acting Undang in accordance with the adat. He instructed the plaintiff to investigate and put forward a suitable candidate for the appointment of a new Undang. On December 4, 1979 he received a nomination naming Encik Musa bin Wahab as a candidate and on receipt of the nomination he directed the plaintiff to include Encik Musa in the list of possible candidates and to investigate further into his background and eligibility. On December 14, 1979 he received a letter from the plaintiff notifying him of three candidates and the second defendant was not one of them. In view of the foregoing he convened a meeting on December 24, 1979.

It is the first defendant's contention that as there was no single candidate acceptable by the lembagas it was his duty to choose a new Undang in accordance with the adat.

The second defendant maintained that he was

lawfully elected as new Undang of Luak Jelebu in accordance with the adat on February 4, 1980. He pointed out that on February 7, 1980 the Dewan Ka'adilan dan Undang (Council of the Yang di-Pertuan Besar and the Ruling Chiefs) held a meeting and it gave its approval and blessing to his appointment.

As for the application to strike out the Writ of Summons and the statement of claim, it is the defendants' contention that the court has no jurisdiction to entertain the action on the ground that the claim relates to purely question of adat and customs of the Malays in Luak Jelebu. The defendants also contended that the plaintiff's action is scandalous, frivolous, vexatious and an abuse of the process of the court.

The second defendant has raised a further ground, namely, that as Undang of Luak Jelebu he is Ruler of the State of Negeri Sembilan as defined under the Laws of the Constitution of Negeri Sembilan and therefore enjoys protection of the Constitution from being sued in his personal capacity.

At the hearing before me Encik Ariffin appearing on behalf of both the defendants urged the court to hold that it has no jurisdiction to hear the case against both the defendants. He submitted that on a matter respecting the adat and customs of the Malays the Dewan Ka'adilan established under Article XVI Chapter 6 of the First Part of the Laws of the Constitution of Negeri Sembilan is the highest and the deciding authority in the State. Article XVI reads —

"There shall be a Dewan Ka'adilan dan Undang to be called in English 'The Council of the Yang di-Pertuan Besar and the Ruling Chiefs' hereinafter referred to as the Dewan to advise on questions relating to Malay Customs in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs *and* to exercise such functions as may be conferred upon it by this Constitution or any other written law."

There is not the slightest doubt in my mind that the Dewan Ka'adilan is fully conversant with matters of Malay Customs in the State and is indeed the most appropriate body to advise on the questions of Malay Customs. And I am of the view that any evidence of an advice given by the Dewan on the correct adat applicable to a given situation would be highly relevant. There is, however, no evidence before the court of any such advice. The only evidence before the court is an extract of the minutes of the Dewan Ka'adilan that is exhibited to the defendants' affidavit which incorporates a note to the effect that the Dewan Ka'adilan dan Undang Negeri Sembilan at the meeting held on that day had given its blessing to the appointment of Dato' Musa bin Abdul Wahab to hold the office of new Dato' Undang Luak Jelebu with the title of Dato' Mandika Menteri Akhirulzaman. It may be argued that the "blessing" means an "approval" or a "confirmation" of such appointment but it is also open to argument that since the function of the Dewan is to advise on questions relating to Malay Customs in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs it could not have been the intention of the Dewan to approve or disapprove the appointment as it was not called upon to determine the validity or otherwise of the appointment. And if the Dewan should be called upon to decide would it have the necessary authority to do so.

Fundamentally, the Dewan is conferred with dual functions under Article XVI, namely,

(a) to advise on questions relating to Malay Customs; and

(b) to exercise such functions as may be conferred upon it by the Constitution or any other written law

In the circumstances the court is unable to construe the effect of the Dewan's decision any more than a blessing not amounting to an approval or a confirmation. Clearly, the Dewan was not sitting in judgment to consider the validity or otherwise of the appointment or to approve or disapprove such appointment. It would seem to me that the Dewan intentionally refrained from using the word "approve" or "confirm". In the capacity it was sitting the Dewan was not exercising specific function conferred by the Constitution or a written law to enable it to review or determine a dispute concerning the validity of the second defendant's appointment. Although Article XIV of the First Part of the Laws and Constitution of Negeri Sembilan clearly provides that the Undangs shall be persons lawfully elected in accordance with their respective luaks, there is, however, no provision in the Constitution of a written law that confers authority upon the Dewan or any other body to determine a dispute arising from the election of an Undang.

I refrain at this stage of the proceedings to determine the merits or demerits of the claim, however, I feel constrained to hold that in consideration of what I have stated there is clearly a serious question to be considered and I see no reason why this court should be divested of its inherent jurisdiction to hear the case. There is absolutely no question of any interference with the adat instead it would be the function of the court to invoke the relevant adat as practised in Luak Jelebu to determine the question before the court.

The question that calls for determination is whether the first defendant had acted in accordance with the adat laws and constitution of Luak Jelebu as explained in the Papers by A. Caldecott entitled "Jelebu Its History and Constitution" published in *R.J. Wilkinson's* Papers on Malay Subjects at pages 348/9 to the effect that —

"... On the death of an Undang the Manteri becomes regent and his orders are Sabda. The three lembagas then approach the Manteri and tell him to seek out a new Undang. The Manteri refers this request to the Ombi who calls the waris yang tiga and instructs the waris, whose turn it is, to put forward a candidate. It is the Ombi's business to satisfy himself as to the eligibility of the candidate proposed and to reject him if the rules of inheritance (pesaka) have not been observed. If the Ombi is satisfied on this score he must present him to the Manteri who will consider the candidate in respect of his qualification as regards adat. If he approve him, he will commend him to the 'Eight' with whom rests his final acceptation or rejection."

Turning now to the defendants' contention that the claim is vexatious, scandalous and an abuse of the process of the court, it is, I think, settled law that an application under Order 25 rule 4 applies only to plain and obvious cases i.e. to cases where the statement of claim clearly discloses no cause of action. There is here a serious question to be considered and for this reason the application must fail.

With regard to the second defendant's contention that he is a Ruler of the State of Negeri Sembilan, reliance is placed on Article XXVIII (1) which reads —

"(1) Subject to Clause (2) of this Article the expression *Ruler* wherever it occurs in the Second Part of the Constitution shall mean His Highness and at least three of the four Undangs or, if there be only three Undangs holding office at the time of the exercise of such discretion, at least two of them:

Provided that His Highness alone and in accordance with the Constitution may exercise His discretion under Clause (2) of Article XL as aforesaid, in cases described —

(i) in paragraph (f) thereof, where the appointment does not affect the prerogative, powers and jurisdiction of the Ruling Chiefs in their respective territories;

(ii) in paragraph (g) thereof."

Encik Ariffin has asked the court to invoke Clause (2) of Article 181 of the Federal Constitution which provides that no proceeding whatever shall be brought in any court against the Ruler of a State in his personal capacity. It is argued that since the second defendant is a Ruler under Article XXVIII (1) of the State Constitution Clause (2) of Article 181 of the Federal Constitution therefore bars the institution of any proceeding against him in any court in his personal capacity.

With all humility I fail to see any merit in the contention. "Ruler" as defined under Article 160 Clause (2) as follows —

"in relation to Negeri Sembilan means the Yang di-Pertuan Besar acting on behalf of himself and the Ruling Chiefs in accordance with the Constitution of that State;"

would have to be considered in determining whether an Undang is a "Ruler" for purposes of Clause (2) of Article 181.

It is primarily a question of construction. To my mind the definition covers the Yang di-Pertuan Besar on behalf of himself in his personal capacity as well as the representative capacity i.e. on behalf of the Ruling Chiefs. By himself or on behalf of himself an Undang cannot be construed to come within the definition of "Ruler". Thus the immunity from proceedings as envisaged by Clause (2) of Article 181 cannot be held to cover an Undang.

In this connection it is pertinent to refer to Clauses (1) and (2) of Article 71 which read as follows —

"(1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State; but any dispute as to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.

(2) Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of a State."

Looking at these two Clauses it is apparent that a distinction is drawn between a Ruler of a State and a Ruling Chief of Negeri Sembilan. Applying Clause (2) of Article 71 with necessary modifications, it seems reasonable to construe Clause (1) to mean that the Federation shall guarantee the right of a Ruling Chief of Negeri Sembilan to hold, enjoy and exercise the constitutional right and privileges of a Ruling Chief in accordance with the Constitution of that State. The second limb of Clause (1) does not appear to be applicable to a Ruling Chief.

The right of a Ruling Chief of Negeri Sembilan to hold, enjoy and exercise the constitutional right and privileges must therefore be restricted to only such right and privileges as provided under the State Constitution without the benefit of the immunity from being sued in a proceeding in a court of law in his personal capacity as provided under the Federal Constitution.

In the light of all this I am of the opinion that there is no merit in the defendants' applications and they must fail. They are therefore dismissed with costs.

As for interim injunction it is also settled law that pre-eminently it is a discretionary remedy. The discretion must, however, be exercised judicially and in accordance with the recognised principles. The court must take into consideration the circumstances surrounding this particular case in determining whether to reject or grant the order applied for. The court shall also have regard to the balance of convenience even though it should find that there is a serious question to be tried. In the present case there is no evidence to indicate that the plaintiff would suffer any damage if the interim injunction is refused. There is also no question of the plaintiff being injuriously affected by a breach. In the circumstances of this particular case I do not consider it proper to grant the interim order sought. I therefore dismiss the application with costs.

The dispute which surrounds the appointment of the second defendant should in my view be speedily disposed of. The action should be heard as soon as it is ready for trial. I make an order for an early trial to be held.

From the above judgment the defendants appealed to the Federal Court.

FEDERAL COURT.

N. Ramachandran (*Ariffin bin Jaka* and *Joseph Chia* with him) for the appellants.

Abdul Razak bin Ahmad for the respondent.

Razali bin Hassan, Legal Adviser, Negri Sembilan — Watching brief for State of Negri Sembilan.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P.: We have been entrusted with a grave and delicate issue — whether or not to issue a declaration that the purported election of the 15th Undang of Jelebu is *ultra vires* adat laws and constitution of Luak of Jelebu.

My first observation is that judges should adjudicate on such matters as the present with restraint and certainly not to emulate the quasi-legislative role of the United States Supreme Court. The power to grant a declaration should be exercised with a proper sense of responsibility and after a full realization that judicial pronouncements ought not to be issued unless there are circumstances that properly call for their making. (See *Ibeneweka* v. *Egbuna*[1]).

What perhaps stands out about declaratory relief is the wide range of circumstances in which the procedure has been invoked already and the wide variety of cases in terms of subject matter where this type of

proceedings has been used. It has now become a regular feature of litigation and Lord Denning was probably only anticipating a little when he said in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[2] that:

"The wide scope of it can be seen from the speech of Viscount Kilmuir L.C. in *Vine* v. *National Dock Labour Board* ([1957] A.C. 488, 498) from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing."

Being discretionary, the remedy may, of course, be denied in appropriate cases. It may also be excluded by enactments. Some enactments expressly exclude the remedy (see *N.T.S. Arumugam Pillai* v. *Government of Malaysia*[3]) where some of the cases are discussed), whereas the courts have to look behind the not very clear language of others in order to discover whether Parliament or some other enacting body had intended that result. In general the existence of another remedy is not sufficient to make a declaration unavailable but the courts may decide that that other remedy is more appropriate to the circumstances.

It is here we must distinguish cases where the courts have held that they lack jurisdiction to deal with the matter and those cases where in the exercise of discretion, jurisdiction is declined. In *Rediffusion (Hong Kong) Ltd.* v. *Attorney-General,*[4] the Privy Council discussed the distinction and recognised that what is often loosely referred to as matters of jurisdiction really are not so at all but merely situations where a court, having jurisdiction in the matter, refuses to exercise it:

"When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, i.e., to embark upon the inquiry whether facts exist which would entitle the court to grant relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it."

The history of the case had been admirably dealt with at length by the learned Lord President and Tan Sri Dato' Salleh Abas F.J. I shall not repeat it. I shall confine my judgment to the issue of jurisdiction. Shorn of its massive publicity and its numerous surrounding issues the case is essentially one of interpretation of Article 71 of the Federal Constitution which "guarantees the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges", and articles XIV and XVI of the Constitution of the State of Negeri Sembilan. Article XIV deals with the election of the Ruling Chiefs (the Undangs) who "shall be persons lawfully elected in accordance with the custom of their respective luaks." Article XVI is reproduced in full:

"There shall be a Dewan Ka'adilan dan Undang to be called in English 'The Council of the Yang di-Pertuan Besar and the Ruling Chiefs' hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law."

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see *Minister of Home Affairs* v. *Fisher*[5]). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds.*[6]

It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. Embodied in these rights are the guarantee provisions of Article 71 and the first point to note is that that right does not claim to be new. It already exists long before Merdeka, and the purpose of the entrenchment is to protect it against encroachment. In other words the provisions of Article 71 are a graphic illustration of the depth of our heritage and the strength of our constitutional law to guarantee and protect matters of succession of a Ruler (including election of the Undangs) which already exist against encroachment, abrogation or infringement.

Election of Undangs has since time immemorial been made in accordance with the ancient customary laws of their respective luaks. Article XVI of the Constitution of the State of Negeri Sembilan as pointed out by Salleh Abas F.J. preserves and protects the ancient customary laws of Negeri Sembilan. It was drafted in broad and ample style which lays down principles of width and generality pertaining *inter alia* to Malay custom. It gives *carte blanche* to the Dewan to give 'advice' on such matters. 'Advice' here calls for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'. This must mean approaching the question with an open mind. In that context the Dewan does not make suggestions; it takes cognizance of such matters as may be referred to it

and gives decisions in the form of 'advice' in the same way as the Privy Council gives 'advice' to His Majesty the Yang di-Pertuan Agong on matters of appeals from this country.

This court, being the highest court in the land in constitutional matters should take the occasion to reaffirm expressly, unequivocably and unanimously the constitutional position of the Ruler in matters of succession including the election of the Undang and to hold that it is non-justiciable. Here is something basic to our system of government: the importance of holding it far transcends the significance of any particular case. The Dewan in this case has blessed the appointment of the 15th Undang of Jelebu and for judges at first instance or an appeal to pre-empt its function is for courts to usurp the function of the Dewan, and apart from this, the Dewan is a far more suitable forum for discharging that function than a panel of five judges. It is open to the courts in this country to refuse a remedy on the ground that it is *forum non conveniens*. This doctrine is that a court may decline to exercise jurisdiction on the ground that another body would be more appropriate.

I would allow the appeal with costs here and below.

Salleh Abas F.J.: The dispute between the parties in this case is whether the second appellants' appointment as the fifteenth Undang of Jelebu on February 4, 1980 was made in accordance with the ancient constitution and custom of the Luak of Jelebu. The respondent contended that it was not, whilst the appellants claimed that it was so. However, before this issue was tried, the appellants raised a preliminary objection stating that the court has no jurisdiction to go into the matter. The objection was overruled by the Seremban High Court and so the case came before us for decision. The question which requires our determination in this appeal is only confined to one of jurisdiction. In my view the court has no jurisdiction.

Article 71(1) of the Federal Constitution makes provision that whilst the "Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State," the Federation, however, has to adopt a policy of non-interference and strict neutrality as regards a dispute as to the title or right of a particular individual to succeed as Ruler. This principle of strict neutrality is clearly stated in the second limb of Article 71(1) as follows:

"but any dispute as to the title to the succession as Ruler of any State shall be determined *solely* by such authorities and in such manner as may be provided by the Constitution of that State". (*The emphasis is mine*).

There can be no doubt that this principle is also applicable to a dispute relating to the appointment of an Undang because Clause (2) of this Article provides that: —

"Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of State."

The State Constitution of Negeri Sembilan recognizes the continued application of the ancient constitution and ancient custom of the State so long as they are not inconsistent with the State Constitution (Article XXXII). Part of the ancient constitution and ancient custom is the concept of rulership. There exist five Ruling Chiefs (Article XIV) in addition to the royal personage styled as Yang di-Pertuan Besar of the State, and not as Sultan like the royal personage in other states (Article VII). The Ruling Chiefs are the Undangs of Sungai Ujong, Jelebu, Johol and Rembau and Tengku Besar of Tampin (Article XIV). The rulership in Negeri Sembilan State Constitution unlike that in other states is a composite concept, consisting of His Highness the Yang di-Pertuan Besar and the five Ruling Chiefs (Article XXVIII). For the exercise of functions under the State Constitution, His Highness the Yang di-Pertuan Besar and at least three of the four Undangs must act (Article XXVIII(2)), but for the exercise of functions under the Federal Constitution only the Yang di-Pertuan Besar is required to perform them, although in performing those functions, His Highness is regarded as acting not only on his own behalf but also on behalf of the Ruling Chiefs as well (Article 160(2)). The reason why the Undangs are not required to perform the functions under the Federal Constitution must have understandably been due to the question of convenience. Because the definition of ruler is a composite one, the Constitution of the State itself was declared and ordained by His Highness together with the Ruling Chiefs (*see preamble to the Constitution of Negeri Sembilan*). His Highness the Yang di-Pertuan Besar is elected by the four Undangs (Article VII), whilst the Undangs themselves have to be elected in accordance with the custom of their respective territories (luaks) (Article XIV(1)). His Highness and the Ruling Chiefs and a few other persons are members of a Council known as the Dewan Ka'adilan dan Undang, in short "the Dewan". (Article XVI and Article XVII). The main function of the Dewan is "to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs."

The Dewan is the culmination of the lengthy political and constitutional developments of the State. It is the embodiment of traditional elements and values which are kept alive by the Constitution. It is a machinery to rationalize these elements so as to make them work under a modern democratic constitution. Until the present Constitution was promulgated in 1959 Negeri Sembilan had no written constitution. Her constitutional law, however, could only be found in the various treaties entered into by the Yang di-Pertuan Besar, the Undangs and the British Government. Besides these treaties, customary laws were allowed to continue side by side to govern the political social and economic life in the respective territories so long as they did not become a hindrance to the British policy. Indeed Negeri Sembilan itself was only constituted as a State by the treaty of July 13, 1889, whereby the parties concerned agreed to form "a Confederation of States to be known as the Negeri Sembilan." In 1895 this Confederated State joined the Federation of Protected Malay States of Perak, Selangor, Negeri Sembilan and Pahang. The forma-

tion of Malayan Union in 1946 and its subsequent transformation into the Federation of Malaya in 1948 did not give Negeri Sembilan a separate written constitution. It was only Independence in 1957 which finally gave her the present Constitution promulgated in 1959. Under this Constitution the ancient constitution and custom are preserved, "except as expressed herein", and "where not inconsistent with" the Constitution. To rationalize and make this ancient constitution and custom work and to avoid disputes which could arise from many divergent interpretations of this ancient constitution and ancient custom, the Dewan is established with power "to advise on questions relating to Malay custom in any part of the State or other matters which may be referred to it by His Highness or any of the Ruling Chiefs." The expression "to advise on" in my judgment is not merely confined to the ascertainment and statement of customary law in an abstract and generalized way like a statute or an enactment. Neither is the expression restricted to mean only "to give an opinion". The expression "to advise on" must in my judgment be the ascertainment and the application of law on a given subject to a particular set of facts. The advice so expressed by the Dewan, irrespective of the language used by the clerk of the Dewan to record it, whether "giving its blessing or approval" or some other words clearly indicates the thinking and view of the Dewan and such opinion, since it comes from the highest and august body should be worthy of respect and obedience. It should not be ignored. There is no need for a provision in the Constitution saying that the advice is binding. Customary law, after all is based on the recognition and acceptance that a rule is binding, otherwise inconveniences and crisis would follow from disobedience thereto. What higher and better authority deserves and commands respect in the interpretation and explanation of customary law on this particular topic than the Dewan itself which consists of the Ruler of the States and other prominent persons? As an example of an advice being binding, is the advice pronounced by the Federal Court under Article 130 of the Federal Constitution when it exercises its advisory jurisdiction on a question referred to the court by the Yang di-Pertuan Agong for its opinion as to the effect of any provision of the Constitution. Such advisory opinion was expressed by the court in the *Government of Malaysia* v. *Government of the State of Kelantan*,[7] as to the meaning of the word "borrow" under Article III(2) of the Federal Constitution. Here there can be no doubt that the court's opinion is binding, although there is no provision in the Federal Constitution which says that it is so.

In conclusion I find myself unable to subscribe to the view that the Dewan has no authority to resolve this dispute. This means that the court has no jurisdiction over the matter, as Article 71(1) clearly points to the way in which the dispute has to be settled, and by reference to the Dewan, the matter is closed.

The words "merestui perlantikan" used in the minutes to record the decision of the Dewan at the end of its one hour close-door deliberation, translated as "giving its blessing" or some other English rendering, in my view convey the meaning that the Dewan was of the like mind and agreed to the validity of the appointment of the second respondent as the 15th Undang of Jelebu. Since I hold that the Dewan has the authority to make the determination, the advice so expressed should bring the matter to an end.

It is observed that the respondent himself had sent a petition, signed by himself and six other Lembagas to the three Undangs of Sungai Ujong, Rembau and Johol and to the Secretary of the Dewan. The minutes of the Dewan recorded that His Highness too received the petition. What then was the purpose of sending the petition, if the respondent and the other Lembagas did not want His Highness and the Undangs to take some positive action? And what more logical action was expected to be taken by the recipients of the petition than to thrash this matter in the Dewan? Is the Dewan not a proper and suitable forum to deal with it? Thus I cannot see how the matter could still be prolonged just because the respondent had received an adverse ruling from the Dewan on his petition. It was he who desired a ruling by sending the petition and he must therefore accept and abide by it and cannot now be heard to say that the Dewan has no authority. His conduct estops him from raising the issue any further. The court is certainly not an appellate authority as regards the "advice" of the Dewan.

Counsel for the appellants also submitted that the court has no jurisdiction to determine the dispute because the second appellant enjoys immunity from judicial proceedings under Article 181(2). This Article is as follows: —

> "181(1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.
>
> (2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity."

The short answer to this submission is that this Article is irrelevant in the present case, because the very appointment of the second appellant itself is under attack. This Article would be relevant in cases where the suit is against an Undang whose appointment as such is not in dispute and the suit is for something he has done or for some other matter.

Counsel made this submission in order to show to us that an Undang is a Ruler because he enjoys immunity from judicial proceedings under Clause (2) of this Article. This argument in my view turns the Article completely upside down. In the first place the immunity under Clause (2) is one of the results or consequences of one being a Ruler and not vice versa. It is not on account of this immunity that a person is a Ruler. An accredited diplomat is not a ruler, although he enjoys this immunity. In the second place, the first question as regards Clause (2) is whether an Undang enjoys the immunity, and this question in fact depends upon whether the word "Ruler" in that clause includes also the Ruling Chiefs. If they are so included, then no proceedings in their personal capacity can be brought in court against them; otherwise such proceedings can be instituted. Whether one can read into the word "Ruler" in Clause (2) so as to include the Ruling Chiefs is debatable. It depends

upon how one construes Clause (1) itself and also on whether the definition of "Ruler in Article 160(2) is applicable to the interpretation of Clause (2) of Article 181. In Clause (1) of Article 181, the Rulers and the Ruling Chiefs are mentioned separately, whereas in Clause (2) only the Rulers are mentioned, and not the Ruling Chiefs. Even under Clause (1) itself, there is a difference in that the Ruling Chiefs do not possess sovereignty though they have prerogatives, powers and jurisdiction, whereas the Rulers have all the four attributes, namely sovereignty, prerogatives, powers and jurisdiction. One therefore could conclude that the framers of the Federal Constitution did not intend to treat an Undang to be on equal footing as a Ruler who belongs to a royal ancestory, though an Undang is part of the Ruler of Negeri Sembilan. In my view the difference in status between the Rulers and the Ruling Chiefs as stated in Clause (1) is highly relevant in interpreting the word "Ruler" in Clause (2). It is the sovereignty possessed by the Rulers which make them immune from judicial proceedings in their personal capacity. They can of course be sued in their official capacity, but in that event the suits will have to be instituted in the names of the Governments of their states. It follows therefore that as an Undang has no sovereignty, he does not enjoy such judicial immunity. The omission of the words "Ruling Chiefs" in Clause (2) of Article 181 must have been deliberate and not merely due to a draftman's error. The answer to this question is of course not called for in this appeal, but I deal with it because in my judgment the question whether an Undang is a Ruler does not depend upon Clause (2) of Article 181.

Since Clause (1) of Article 181 itself provides an answer to the applicability of Clause (2) to an Undang, it follows therefore that the definition of "Ruler" under Article 160(2) for this purpose is virtually unnecessary. The definition of "Ruler" under Article 160(2) is reproduced as follows: —

"160(2) In this Constitution, *unless the context otherwise requires*, the following expressions have the meanings hereby respectively assigned to them, that is to say —

'. . .'

'Ruler' —

(a) in relation to Negeri Sembilan, means the Yang di-Pertuan Besar *acting* on behalf of himself and the Ruling Chiefs in accordance with the Constitution of that State; and

(b) in the case of any State, includes, *except in Article 181(2) and the Third and Fifth Schedules*, any person who in accordance with the Constitution of that State exercises the functions of the Ruler." (The emphasis are mine).

From the introductory phrase "unless the context otherwise requires", it is clear that the definition is only intended to apply where the context is not otherwise. Since there is a difference in the content of Clauses (1) and (2) of Article 181, it seems reasonable therefore to conclude that the definition of "Ruler" under Article 160(2) is inapplicable for the purpose of interpreting the word "Ruler" in Article 181, be it Clause (1) or Clause (2).

In my view the definition under Article 160(2) is purely a functional one; it being confined to the performance by a Ruler of functions under the Federal Constitution and federal law. It has no bearing upon his personal status at all. This functional definition in the case of Negeri Sembilan means that the functions under the Federal Constitution and federal law are exercisable by His Highness the Yang di-Pertuan Besar alone although in the performance of these functions he is acting on behalf of himself as well as the Ruling Chiefs. As an example of this is the attendance of the Rulers' Conference. Here His Highness alone attends the Conference. The idea of agency and trust is incorporated into the definition because the Rulership in Negeri Sembilan is not unitary or singular but shared. This is all that the definition under Article 160(2) means. It certainly does not mean to say that an Undang is a Ruler for all purposes. He is a Ruler as regards performance of functions and power but not a Ruler for the purpose of judicial immunity under Article 181(2). Although by virtue of Article XXVIII of the State Constitution, an Undang is included in the definition of Ruler, and he is therefore a joint Ruler. This definition is also a functional one. As regards the performance of functions under the State Constitution and the State law, these are exercisable by His Highness and at least by three Ruling Chiefs. (Article XXVIII(2)). Thus even the definition under the State Constitution is also a functional one just as it is under Article 160(2).

That the definition under Article 160(2) is a functional one is clearly reflected by the second limb of the definition as regards other States. Here while the definition of "Ruler" includes "any person who in accordance with the Constitution of that State exercises the functions of the Ruler", it excludes such person from being regarded as a Ruler for the purpose of Article 181(2), (dealing with judicial immunity), the First Schedule (dealing with election of the Yang di-Pertuan Agong) and the Fifth Schedule (dealing with the Conference of Rulers). Such exclusion is effected by the words "except in Article 181(2) and the Third and Fifth Schedules". Thus for these purposes — i.e. Article 181(2) the Third and the Fifth Schedules the status of a Ruler who is a descendant of a royal ancestor is preserved and not extended to others. He is a Ruler in the full sense of the word, both functionally and status wise. Others such as the Ruling Chiefs and the Yang di-Pertua Negeri are included in the definition of Ruler for certain purposes only. It appears therefore clear that by virtue of the context of Article 181 itself and the definition of Ruler under Article 160(2), an Undang is not intended to be included in the word "Ruler" under Article 181(2). Here I agree with the conclusion of the court below that "the immunity from proceedings as envisaged by Clause (2) of Article 181 cannot be held to cover an Undang", because for the purpose of this Article he is not a Ruler.

Even if the immunity extends to an Undang, I cannot see its relevancy in the present proceedings, because the election of the second appellant itself is in dispute. The issue raised is highly premature and entirely irrelevant. It would have been relevant if the appellant's appointment is not in dispute and he is sued in connection with something else in respect of his private business or matter.

In view of what I have discussed earlier my con-

clusion is that the court of law has no jurisdiction to try this dispute. The second limb of Clause (1) of Article 71 read together with Clause (2) of that Article clearly shows that the dispute has to be settled by authorities and in a manner prescribed by the Constitution of Negeri Sembilan. The Dewan is such an authority as it is established under Article XVI of that Constitution. The respondent having sent petitions to His Highness, and to other Ruling Chiefs and also to the Secretary of the Dewan; and the Dewan having sat and deliberated upon the petitions and finally given its ruling, the matter should have ended and the respondent is estopped from raising the issue again, especially before the court of law. Lastly Article 181(2) is irrelevant for the purpose of the present appeal. That Article does not define a Ruler but deals rather with the consequence of one being a Ruler. It cannot be used as a ground to show that an Undang is a Ruler for all purposes.

In conclusion I would allow this appeal with costs both before us and the court below.

Ibrahim Manan F.J.: The main issue in this appeal concerns the jurisdiction of the court and for the determination of that issue I think I need set out only the following undisputed facts. On February 4, 1980 the first defendant/appellant (the Dato Menteri and acting Undang) appointed and proclaimed the second defendant/appellant (a member of the Warith Sarin) as the 15th Undang of the luak of Jelebu. Plaintiff/respondent (the Dato Ombi) and 6 other Lembagas disputed the appointment and the dispute was brought to the attention of the Dewan. The Dewan met on February 7, 1980 to discuss the dispute and was attended by the following high officials on invitation; the Menteri Besar, the State Secretary, the Legal Adviser and the Mufti. The Menteri Besar was requested to report on the dispute which he did. Then the members discussed the matter among themselves behind closed doors for about one hour at the conclusion of which the Dewan decided to give its blessing to ("merestui") the election (appointment).

Plaintiff/respondent was not satisfied with the Dewan's decision and on February 22, 1980 he filed a Writ (Civil Suit No. 40 of 1980) in the High Court at Seremban asking for a declaration that the appointment was null and void on the ground that it was made in violation of the adat, constitution and laws of Negri Sembilan. In their combined Statement of Defence both defendants/appellants denied the nullity of the appointment and applied to have the Writ struck out on the ground that the court had no jurisdiction to determine the matter. Abdul Hamid F.J. refused the application and the defendants/appellants are appealing against that decision.

Article 71 of the Federal Constitution guarantees the right of an Undang "to succeed and to hold, enjoy and exercise his constitutional rights and privileges" in accordance with the Constitution of the State of Negri Sembilan and provides that "any dispute as to the title to succession . . . shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State."

Article XIV of the State Constitution provides that the Undang of Jelebu shall be a person "lawfully elected in accordance with the custom "of that luak" and Article XVI provides that there shall be a Dewan Keadilan dan Undang (the Dewan) "to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such function as may be conferred upon it by this Constitution or any other written law." Article I of the State Constitution provides that it "shall be read subject to the Federal Constitution."

The Dewan has used the word "blessing", the said Article XVI the word "advise" and the said Article 71 the word "determined" but in my view there is not much significance in the different words used. Before the Dewan decided to give its blessing it must have determined the dispute before it and so satisfied itself as to enable it to advise that the second defendant/appellant had been "lawfully elected in accordance with the custom" of his luak.

It is true that the said Article XVI does not itself state that the validity of its act shall not be questioned in any court but in my view the combined effect of the said Articles XVI and XIV of the State Constitution read in the light of the said Article 71 of the Federal Constitution is that the Dewan is intended to be the sole authority to determine and advise on the dispute.

For the above reason I would hold that the court has no jurisdiction to try the dispute. Having held that I consider it not necessary for me to deal with the other issue in this appeal which concerns the legal immunity of the second defendant/appellant from being sued in his personal capacity.

I would therefore allow the appeal and order that the writ be struck out and that the costs in this court and in the court below be paid by the plaintiff/respondent to the defendants/appellants.

Hashim Yeop A. Sani J.: In support of the leading judgment I need only say a few words on the concept of "Rulership" in the State of Negeri Sembilan and the legal status of the Dewan Keadilan.

It is essential to distinguish between the "unitary" and the "composite" concept of Rulership when we speak of the "Ruler" of the State of Negeri Sembilan. The Federal Constitution is indeed careful in its treatment of the subject of "Ruler" in relation to Negeri Sembilan. Clause (2) of Article 71 directs that clause (1) be applied with the necessary modifications to the Ruling Chiefs of Negeri Sembilan. Clause (1) speaks of the "constitutional rights and privileges" of the Ruler and "succession as Ruler." The definition "Ruler" in Article 160 brings out clearly the composite concept of Rulership. This definition is meant only for use in its proper context in the Federal Constitution itself and therefore should not be applied generally or out of context. Article 181 again clearly distinguishes the fact that a Ruling Chief has everything that a Ruler has except "sovereignty". There Article 181(2) does not give a Ruling Chief immunity from legal process.

In the context of the Negeri Sembilan Constitution the Dewan Keadilan must surely be regarded as the custodian of the adat in Negeri Sembilan. The constitution of the members of the Dewan Keadilan would

indicate this very intention. The advice of the Dewan Keadilan in the matter of adat must therefore be regarded as binding and conclusive for otherwise there would be uncertainty.

The provision of Article 71(1) of the Federal Constitution as it now appears was not contained in the early draft of the Merdeka Constitution. It was inserted only in a subsequent draft which became the final draft. In the original draft the genesis of this provision appeared as Article 65(1) but dealing solely with federal guarantee of a Ruler of a State to succeed and ended there. It did not speak of the guarantee "to hold, enjoy and exercise" constitutional rights of the Rulers and the Ruling Chiefs. I cannot find any reason in the Reid Report for the widening of the guarantee in the final draft but I can only surmise it must surely have been inserted to preserve the then existing rights of the Rulers and the Ruling Chiefs of Negeri Sembilan. In my view to override the advice of the Dewan Keadilan in matters of adat relating to succession of a Ruling Chief would be going against the guarantee of Article 71(1). It necessarily follows that to enlarge the jurisdiction of the court to include adjudication on such matters as succession of a Ruling Chief would likewise to my mind be *ultra vires* Article 71.

I would also allow the appeal with costs here and below.

Suffian L.P. (dissenting): This dispute concerns the succession to the 14th Undang (Ruling Chief) of the luak (territory) of Jelebu in the State of Negri Sembilan, and the answers to the issues that arise in this appeal turn on the construction of certain provisions in the Federal Constitution and in the State Constitution.

Preliminary

On November 20, 1979, when the 14th Undang died, it was necessary that his successor be, in the words of Clause (1) of Article XIV of the State Constitution, a person "lawfully elected in accordance with the custom of [his luak]". Until then, in accordance with the adat (custom) and constitution of the luak, Dato Menteri Othman bin Baginda ("the first defendant") became Acting Undang. He was bound by the adat of the luak to instruct Dato Ombi Syed Alwi bin Syed Idrus ("the plaintiff") one of the Dato Lembaga (Tribal Chiefs) of the luak to investigate and nominate candidates, from amongst whom a suitable person would be elected as successor to the deceased Undang.

On December 4 the Dato Menteri received a nomination from Kecik bin Kiman, Dato Raja Diraja or Buapak from Waris Sarin, nominating Musa bin Wahab, P.J.K. ("the second defendant") as a candidate. On receipt of the nomination the first defendant directed the plaintiff to investigate into Encik Musa's background and qualifications and include his name in the list of candidates.

On December 14, the first defendant received a letter from the plaintiff giving the names of three possible candidates: namely Syed Zin bin Syed Hussein, Syed Sulong bin Syed Chik and Nordin bin Ahmad. It will be observed that the second defendant's name was not on the list. The first defendant claimed that it was his duty under the law, custom and constitution of the luak to see that the nomination of the second defendant be given due consideration, and that the plaintiff had failed in his duty as Dato Ombi by not considering the second defendant's eligibility as a candidate under the rules of pesaka (succession). So the plaintiff as acting Undang called a special meeting of the Tribal Chiefs of the luak on December 24 to discuss the matter. On December 31 another special meeting of the Tribal Chiefs was held attended by eight of them.

The first defendant alleged that there was no single candidate acceptable to the Eight Tribal Chiefs, whereupon it was his duty under the adat, custom and constitution of the luak to choose the new Undang. So he personally investigated into the background and qualifications of all the three candidates submitted by the plaintiff and into those of the second defendant, and he concluded that none of the three candidates was eligible and that only the defendant was a fit and proper person to be appointed the new Undang, that there was no reason why he should not be appointed and that in failing to take into account his eligibility the plaintiff has failed to carry out his duty as Dato Ombi. Subsequently, on February 4, 1980, he (the first defendant) proclaimed the appointment of the second defendant as the new Undang of the luak of Jelebu in accordance with the adat, custom and constitution of the luak.

Seventeen days later the plaintiff filed a suit in the Seremban High Court against the two defendants, alleging that the second defendant was not a candidate for the Undangship, was not qualified for it under the adat, custom and constitution of the luak, that his appointment was not approved by the plaintiff and six other Tribal Chiefs of the luak, whom he named; and by reason of all this the plaintiff asked the court to declare that the purported appointment by the first defendant of the second defendant as the new Undang was invalid as being contrary to the adat, custom and constitution of the luak of Jelebu.

In their defence the two defendants maintain that the appointment was valid according to the adat, custom and constitution of the luak. Secondly, they contend that the court has no jurisdiction to entertain the action. Thirdly, the second defendant for his part alone contends that as the lawfully elected Undang he is immune from being sued in his personal capacity.

On March 24, the two defendants applied by summons in chambers for an order that the plaintiff's statement of claim be struck out on the ground that the court had no jurisdiction because the dispute involved a question of adat and custom of Malays in the luak and, in the case of the second defendant, on the further ground that under the constitution he as Ruling Chief enjoyed legal immunity in his personal capacity.

These contentions were hotly contested. In the event, the learned judge (Abdul Hamid F.J., sitting in the High Court) dismissed the application, holding that the court had jurisdiction to entertain the action and that the second defendant did not enjoy legal immunity.

The defendants have appealed to this court.

Before proceeding any further, it should be stressed that as this matter has not gone to trial yet, the facts given above have been taken from the pleadings and affidavits filed in connection with the summons in chambers, and may not be "firm". Secondly, while clause (1) of Article XIV of the State Constitution speaks of the Undang of Jelebu being elected, the above narration of the facts speaks of his being "chosen" and "appointed", the very words which were used in the affidavit. But it would appear that at this stage there is no signifficance in the deviation from the word used in that clause. Thirdly, the court is not concerned at this stage with the merits of the plaintiff's claim, i.e. with the validity or otherwise of the election of the second defendant.

Issues

There are two issues in this appeal.

First, does the court have jurisdiction to determine this dispute? The defendants contend that, contrary to the ruling of the learned judge, the court does not.

Legal immunity

Secondly, does the second defendant enjoy legal immunity from being sued in his personal capacity? He contends that, contrary to the ruling of the learned judge, he does. As regards this, Article 181 of the Federal Constitution provides:

"181. (1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity."

and Article 160(2) of the same Constitution provides:

"In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say —

'Ruler' —

(a) in relation to Negri Sembilan means the Yang di-Pertuan Besar *acting* on behalf of himself and the Ruling Chiefs in accordance with the Constitution of that State; . . . ."

It appears doubtful that Article 181 gives the second defendant legal immunity at all. I say so because such immunity is usually an attribute of sovereignty, and while Clause (1) of the Article speaks of the sovereignty of a Ruler it speaks only of the prerogatives, powers and privileges, not sovereignty, of a Ruling Chief. And the definition of Ruler in Clause (2) of Article 160 appears to refer only to functions and does not touch on the question of whether or not a Ruling Chief is sovereign.

In the past, treaties between the State and the British were co-signed by the Ruling Chiefs. The Federation of Malaya Agreement, 1957, signed by Their Royal Highnesses the Rulers and the British, one of the instruments granting us independence, was also co-signed by the Ruling Chiefs. It is therefore also arguable that a Ruling Chief does enjoy legal immunity to the extent set out in Article 180, being "sovereign".

Be that as it may, I am of the opinion that even assuming, without deciding, that an Undang of Jelebu enjoys legal immunity in his personal capacity, this is so if and only if there is no dispute as to the validity of his election; and that if the very validity of his election is disputed, then until the court is satisfied as to its validity, the purported holder of the office is subject to the process of the court. Otherwise, every pretender or usurper will enjoy legal immunity. For this reason, I am of the opinion that the second defendant cannot at this stage avail himself of the protection of Article 181(2) of the Federal Constitution.

Jurisdiction

I now turn to the first issue in this appeal. It transpires that before this action was filed this dispute was brought to the attention of His Royal Highness the Yang di-Pertuan Besar, i.e. the Ruler of the State, and on February 7, 1980, a meeting of the Dewan Ke'adilan dan Undang, the Council of the Yang di-Pertuan Besar and the Ruling Chiefs, ("the Council") was held to discuss the matter. This body, established by Articles XVI, XVII and other Articles of Chapter 6 of the Negri Sembilan Constitution, consists of His Royal Highness, the Ruling Chiefs, the Tengku Besar of Tampin and other high dignitaries, and its function (Article XVI) is "to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Royal Highness or any of the Ruling Chiefs . . . ." When the Council deliberates on State or National policy the Menteri Besar shall be invited to attend (Article XVII); and the Council may invite to any of its meetings any person if it considers that his presence is desirable (Article XXIV). This meeting of February 7 had only one item on the agenda, to discuss the election of the new Undang, and was attended by the following high officials on invitation: the Menteri Besar, the State Secretary, the Legal Adviser and the Mufti — which shows the importance attached to the matter under discussion. According to its minutes (Exhibit DM7), His Royal Highness, the President of the Council, reported that he and the Secretary of the Council had each received a letter signed by seven Tribal Chiefs of the luak of Jelebu expressing dissatisfaction with the election of the second defendant as Undang of Jelebu, and His Royal Highness invited the Menteri Besar to report on the dispute, which he did. Then the members of the Council discussed the matter among themselves behind closed doors in the absence of non-members for about an hour. When the non-members had been invited to re-enter, His Royal Highness announced the decision of the Council, formally recorded in the minutes as follows:

"The Council of the Yang di-Pertuan Besar and the Ruling Chiefs, Negri Sembilan which sits this day gives its blessing to the election of Dato' Musa bin Abdul Wahab [the second defendant] to hold the hereditary office of the Undang of Jelebu Territory, the new Undang, with the title of Dato' Mendika Menteri Akhirulzaman."

The last paragraph of the minutes concludes:

"Thereafter His Royal Highness commanded the Secretary to the Council to make a press statement announcing the decision of the Council of the Yang di-Pertuan Besar and the Ruling Chiefs."

Reference was made in the lower court and before us to Article 71 of the Federal Constitution, and it was contended that in the light of that Article, the decision of the Council is decisive of this dispute and removed it from the jurisdiction of the courts. That Article provides that any dispute as to the title to the

succession as a Ruling Chief in Negri Sembilan shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State, and reads as follows:

"71.(1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State, but *any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.*

(2) Clause (1) shall, with the necessary modifications apply in relation to a Ruling Chief of Negri Sembilan as it applies to the Ruler of a State."

The learned judge held that the court has jurisdiction to adjudicate on this dispute because the election must be held in accordance with the custom of Jelebu, the Council's function relating to Malay Custom is merely advisory (the Council does not decide), there is no evidence so far from the minutes showing what was the custom that it took into account when "blessing" the new appointment, and that blessing it is not the same as approving or confirming it, which in any event it has no power to do.

The learned judge also held that the second limb of clause (1) of Article 71 of the Federal Constitution, meaning the words underlined, does not appear to be applicable to a Ruling Chief. With respect I do not agree. In my judgment, the effect of this Article 71 is that the Negri Sembilan Constitution may provide that a dispute as to the title to the succession as a Ruling Chief in Negri Sembilan may be determined solely by such authorities and in such manner as may be provided by it, and if that is done, the court's jurisdiction is ousted.

It was submitted before us that the State Constitution has provided that such a dispute should be determined solely by the Council established by Article XVI of that Constitution, thus ousting the court's jurisdiction. True the Council's function is expressed to be advisory, but it was submitted that it is an august body, consisting of the highest dignitaries in the State who are repositories of Malay adat and with easy access to experts on adat, and that if a disputed election such as this which should have been held in accordance with adat had been referred to it, it would not have blessed it if it found that it had contravened adat, and that if it blessed it it must have found that it did conform to adat; that it was far-fetched to imagine that the constitution-makers of the State intended that thereafter the court should have jurisdiction to re-open the subject and question its validity. And mention was made of the fact that the State Assembly had on February 13, formally "noted" the election of the 15th Undang and that he has been in receipt of his civil list allowances since the election.

I am of the opinion that while it is of course open to the Federal or State Constitution to oust the jurisdiction of the court, it must do so in clear language.

Suppose a vote on something is taken in the House of Representatives; the validity of the proceeding cannot be questioned in the court, because Article 63(1) of the Federal Constitution so provides. Suppose Mr. Speaker certifies that the steps which require to be taken before a money bill may be presented to the Yang di-Pertuan Agong for his Assent over the objection of the Senate, have been taken; the validity of the certificate may not be questioned in the court, because Article 68(4) so provides. Or suppose a Member says in the House something that is defamatory; he may not be sued in court, because Article 63(2) expressly provides that he shall not be liable to any proceedings in any court in respect of anything said by him in the House. In all these instances, there are provisions clearly ousting the jurisdiction of the courts.

In my respectful judgment, there is nothing as clear as the above provisions in the Constitution, Federal or State, ousting the court's jurisdiction over a disputed election of an Undang, and I therefore agree with the learned judge that the court does have jurisdiction to adjudicate on this election — in the same way as the court has jurisdiction to determine the validity of the dismissal by the Public Service Commission of a public servant, when it is challenged.

As a public servant may not be dismissed without being first given a reasonable opportunity of being heard (Article 135(2)), and the court has jurisdiction to entertain and adjudicate on his complaint that he has been so dismissed, there being no provision in the constitution to oust the jurisdiction of the court, so in my judgment the court has jurisdiction to entertain and adjudicate on the complaint of a Tribal Chief of the luak of Jelebu that a new Undang of Jelebu has been elected contrary to the custom of the luak, there being no provision in the Federal or State Constitution ousting the jurisdiction of the court. To determine whether or not the complaint is justified, the court has first to ascertain what is the custom in Jelebu, and then apply it to the facts, and there is no question of the court interfering with or disregarding it. Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means; but if the constitution and law require, as I think they do, that the matter be resolved by the court, then until the constitution has been suitably amended, the court has no alternative but to embark on the task as best as it can, though that will have the unfortunate effect of throwing the court into the political arena. So that courts are not turned into a political forum, I would rather that State constitutions be amended by the appropriate authorities, so that future disputes regarding succession are kept out of our way and decided by persons or bodies better equipped to do so.

Until then, I would with respect have dismissed this appeal with costs.

Appeal allowed by the majority.

Solicitors: *Arif,in & Partners; Ong Ban Chai & Razak.*